No. 80-573

In the Supreme Court of the United States
OCTOBER TERM, 1980

PEGGY TATE SMITH, ADMINISTRATRIX OF THE ESTATE OF JAMES E. TATE, DECEASED, PETITIONER,

VS.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT A. STRAUB
407 One Northland Plaza
20755 Greenfield Road
Southfield, Michigan 48037
(313) 552-5000

JAMES M. BAYSINGER
400 Renaissance Center
Suite 1900
Detroit, Michigan 48243
(313) 259-1144

Counsel for Respondent

OF COUNSEL:
CROSS, WROCK, MILLER & VIESON
400 Renaissance Center
Suite 1900
Detroit, Michigan 48243
(313) 259-1144

RENAISSANCE PRINTING COMPANY, 76 W. ADAMS, KALES BUILDING, DETROIT, MICHIGAN 48226 — PHONE (313) 964-3185

COUNTER-STATMENT OF QUESTIONS PRESENTED FOR REVIEW

First, was the trial judge required to disqualify himself under the circumstances of this case?

Neither of the Courts below found any merit in Petitioner's position, and properly so.

Second, even if maritime and not the common law should have been applied, is the choice of law issue mooted by the jury verdict that Respondent was not guilty of negligence?

The Courts below each so ruled, and correctly so.

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Petitioner, Peggy Tate Smith, Plaintiff-Appellant below, petitioned this Court for a Writ of Certiorari in the above-entitled cause on October 10, 1980. Pursuant to an extension of time within which to do so, Respondent, The Chesapeake and Ohio Railway Company, Defendant-Appellee below, files this, its Brief in Opposition to said petition.

COUNTER-STATEMENT OF THE PROCEEDINGS

James Tate, the Decedent, was found drowned in the waters of the Maumee River near Toledo, Ohio. When last seen alive, he was observed at his station aboard his ship which was moored at Respondent's dock taking on a cargo of coal. Because no one saw him enter the water, there was no direct evidence whether he fell from his ship, from the ship's ladder leading to the dock, or from the dock itself.

Petitioner, Decedent's daughter, commenced the usual admiralty action against the ship's owners for damages on account of her father's death. Thereafter, Respondent was joined as a party, Petitioner asserting a maritime cause of action arising from alleged negligence in design, maintenance and lighting of the dock, and the ship cross-claiming for indemnity.

On the morning of trial, Petitioner settled her case with the ship for $35,000, and the case against Respondent was proceeded with before a jury. After the close of the proofs, the jury was directed to respond in writing to seven special questions. The agreed purpose of the questions was to resolve one way or the other the ship's indemnity claim against Respondent. The jury responded to the questions by finding no negligence on Respondent's part. Further, the jury found that the Decedent had assumed the risk and was, as well, guilty of contributory negligence. Finally the jury concluded that the Decedent entered the water from Respondent's dock, and not from the ship or from the ladder.

Appropriate judgments of no cause for action were entered against Petitioner and the ship, the usual post-trial motions filed and denied, and appeals taken and resolved in favor of Respondent.

ARGUMENT

1. THE COURTS BELOW CORRECTLY RULED THAT PETITIONER'S UNIQUE RECUSAL ARGUMENT LACKED MERIT.

Both the trial court and the Court of Appeals concluded that Petitioner's unique recusal argument lacked merit and that disqualification of the District Judge was not mandated under the circumstances. Ignoring this crucial finding as though the Courts below had not addressed themselves to the merits of the recusal question, Petitioner attempts to focus attention instead upon the language of the courts below concerning waiver.

So far as the matter of waiver is concerned, a fair construction of the decision of the trial judge and the affirming opinion of the Court of Appeals, is that Petitioner's foreknowledge of the asserted recusal ground coupled with her failure to give notice of her position until after she was faced with the adverse verdict of the jury, renders suspicious the gravity Petitioner has assigned to disqualification. Put more succinctly, if Petitioner were as serious before the adverse verdict as she now purports to be, why did she not raise the matter then? Petitioner has had ample opportunity to favor us with an answer to that question but has chosen not to do so either in her petition to this Court or during any of the proceedings in the courts below.

We therefore suggest that the question Petitioner presents to this Court ought properly to be re-phrased as follows:

> May a litigant with foreknowledge of an "off-the-wall" recusal ground abide the verdict of the jury

> and expect to be taken seriously in urging that ground as a basis for a new trial?

We think not. Nor did the trial judge or the Court of Appeals.

2. THE COURTS BELOW PROPERLY DETERMINED THAT COMMON, AND NOT MARITIME LAW APPLIED TO PETITIONER'S CLAIM.

The Petitioner's suggestion that this Court ought to replow the same ground and, accepting Petitioner's arguments, rule for the first time that a seaman has a maritime cause of action against a third-party for tortious land-based conduct, is utterly lacking in merit. The Courts below correctly interpreted this Court's holdings and applied Ohio common law to petitioner's claim. Nor is this case an appropriate vehicle for re-examination of existing law. For whichever law, maritime or common, applies to determine the liability of the Respondent, the same standard — negligence — is the measure of our culpability, for, under either law Respondent owed the seaman a duty of due care. The jury, applying that standard, concluded unanimously that Respondent had breached no duty of care to Petitioner's decedent. Or as the Court of Appeals tersely concluded:

> "Further, even if maritime law applied, Plaintiff would have to show negligence on the part of the C & O Railway, and the jury found no negligence."

CONCLUSION

The lower courts ruled that disqualification of the trial judge was not required under the circumstances and no review of that ruling is sought by Petitioner. The choice of law argument is mooted by the verdict of the jury. The petition, therefore, fails to raise any issue of sufficient merit to warrant review by this Court.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT A. STRAUB
407 One Northland Plaza
20755 Greenfield Road
Southfield, Michigan 48057
(313) 552-5000

JAMES M. BAYSINGER
400 Renaissance Center
Suite 1900
Detroit, Michigan 48243
(313) 259-1144

OF COUNSEL:

CROSS, WROCK, MILLER & VIESON
400 Renaissance Center
Suite 1900
Detroit, Michigan 48243
(313) 259-1144